

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

<b>GEORGE C. TEDDER</b>	)	
Claimant	)	
VS.	)	
	)	
<b>PHIL BLOCKER, INC.</b>	)	
Respondent	)	Docket No. 264,296
	)	
AND	)	
	)	
<b>AMERICAN INTERSTATE INSURANCE COMPANY</b>	)	
Insurance Carrier	)	
	)	

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<b>GEORGE C. TEDDER</b>	)	
Claimant	)	
VS.	)	
	)	
<b>PHIL BLOCKER, INC.</b>	)	
Respondent	)	Docket No. 264,297
	)	
AND/OR	)	
	)	
<b>KANSAS WORKERS COMPENSATION FUND</b>	)	
Insurance Carrier	)	
	)	

**ORDER**

Claimant appeals from the December 4, 2001 preliminary hearing Orders entered by Administrative Law Judge Nelsonna Potts Barnes. Judge Barnes consolidated these two cases for preliminary hearing purposes but entered separate Orders for each docketed claim.

### **Issues**

In Docket Number 264,296 claimant alleges injury on June 26, 2000. Claimant alleged injury on January 16, 2001, in Docket Number 264,297, but this accident date was orally amended to January 17, 2001, at the Preliminary Hearing. Both of these two claims involved injuries to claimant's right shoulder while employed with respondent.

Judge Barnes denied claimant benefits in Docket Number 264,296 based upon the finding that claimant failed to file a timely written claim. In Docket Number 264,297, Judge Barnes found that claimant did not meet with personal injury by accident on January 17, 2001, and/or that claimant failed to prove his rotator cuff injury was caused by an accident arising out of and in the course of his employment with respondent on January 17, 2001.

In Docket Number 264,296 claimant contends the Administrative Law Judge (ALJ) erred in finding claimant failed to make a timely written claim. In Docket Number 264,297 claimant seeks Appeals Board review of the ALJ's failure to find claimant proved he suffered personal injury by accident on or about January 17, 2001, and that such accident arose out of and in the course of his employment with respondent.

### **Findings of Facts and Conclusions of Law**

Claimant worked for respondent as a grain truck driver from December 1999 through January 23, 2001 when he was forced to stop working due to a torn right rotator cuff. Before working for respondent, claimant had suffered a partial tear of his right rotator cuff which was surgically repaired and from which claimant had been given a full release without restrictions. Claimant's job duties with respondent involved driving a hopper style grain truck. In addition, claimant would sometimes be required to unload the grain from the hopper with a shovel. This shoveling activity caused claimant to have symptoms in his shoulder beginning in June 2000.

On October 24, 2000, claimant sought medical treatment with orthopedic surgeon Prince T. Chan, M.D. His treatment included pain medications and cortisone injections. Those injections afforded claimant some temporary relief, but because of claimant's persistent symptoms, Dr. Chan ordered an arthrogram on January 16, 2001. That arthrogram showed a full thickness tear of claimant's right rotator cuff. Claimant was given light duty restrictions which prevented him from working. He underwent surgery to repair the rotator cuff on February 28, 2001.

Although these claims for the right rotator cuff injury were commenced alleging two separate accidents with each occurring on specific dates, the evidence shows a series of accidents and traumas. The Board, therefore, will conform the pleadings to the evidence.

### Conclusions of Law

Ascribing liability for ongoing injury for repetitive trauma cases has never been an exact science. Our appellate courts have struggled to develop rules and policies for such cases. The bright line rule announced in Berry<sup>1</sup> and amplified in Treaster<sup>2</sup> is to place the accident date as late as possible.

Because of the complexities of determining the date of injury in a repetitive use injury, a carpal tunnel syndrome, or a micro-trauma case that is the direct result of claimant's continued pain and suffering, the process is simplified and made more certain if the date from which compensation flows is the last date that a claimant performs services or work for his or her employer or is unable to continue a particular job and moves to an accommodated position.<sup>3</sup>

To the extent this may result in certain inequities when ascribing liability between successive/multiple insurance carriers of a single employer/respondent is given little consequence.

We fail to see why the rule laid down in Berry should not be applied equally in a case where the dispute is over coverage between two insurance companies. The actual date of injury is very difficult to pinpoint in these cases, but the last day of work is not. This case is controlled by Berry.<sup>4</sup>

Of seemingly greater significance, however, is the situation where the claimant changes employment and there are multiple or successive employers.<sup>5</sup> This is particularly true in cases where the claimant left work because of the injury as opposed to simply changing jobs for purely economic reasons.

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<sup>1</sup> Berry v. Boeing Military Airplanes, 20 Kan. App. 2d 220, 885 P.2d 1261 (1994).

<sup>2</sup> Treaster v. Dillon Companies, Inc., 267 Kan. 610 987 P.2d 325 (1999).

<sup>3</sup> Treaster, Syl. ¶ 3.

<sup>4</sup> Anderson v. Boeing Co., 25 Kan. App. 2d 220, 222, 960 P.2d 768 (1998).

<sup>5</sup> See e.g., Surls v. Saginaw Quarries, Inc., Docket No. 83,095 (Kan. App. 2000).

Kansas courts have shown a clear preference for finding one accident date and one injury in repetitive trauma cases. That date is either when claimant leaves work due to the injury or:

Where an accommodated position is offered and accepted that is not substantially the same as the previous position the claimant occupied, the date of accident or occurrence in a repetitive use injury, a carpal tunnel syndrome, or a micro-trauma case is the last day the claimant performed the earlier work tasks.<sup>6</sup>

Obviously, claimant suffered an accidental injury or injuries to his right shoulder while working for respondent. A single accident date is easy to ascribe because he left that job because of his injury, which is one of the triggering events described in Treaster. Thus, if claimant suffered a series of repetitive trauma injuries from his employment with respondent, it was an ongoing injury because he continued to work there at the same unaccommodated job. Although claimant alleges he suffered two separate injuries at Phil Blocker, Inc., based on the testimony and medical evidence presented, the Board finds a series of accidents. The ending date of that series of accidents will be claimant's last day of work which, in this case, appears to have been January 23, 2001. Counting the days from this date of accident, claimant's written claim was timely.

Under our statutory scheme, disability compensation must begin at some fixed point in time. In the case of disability which is the result of a personal injury caused by accident, the date of the accident becomes the date from whence compensation flows. K.S.A. 44-510e(a)(1). In the case of an occupational disease, the injury or condition is deemed to have "occurred" on the last day worked. K.S.A. 44-5a06.<sup>7</sup>

Finally, it is important to note that these cases dealing with date of accident for repetitive trauma injuries were generally concerned with affixing liability for permanent disability compensation, not for preliminary medical or temporary disability benefits. It may be possible, therefore, to have one accident date for purposes of an award of permanent disability and another for purposes of awarding preliminary benefits.<sup>8</sup>

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Orders dated December 4, 2001 entered by Administrative Law Judge Nelsonna Potts

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<sup>6</sup> Treaster, Syl. ¶ 4.

<sup>7</sup> Berry at 228.

<sup>8</sup> Lott-Edwards v. Americold Corp., 27 Kan. App. 2d 689, 6 P.3d 947 (2000).

Barnes in both docketed claims should be and are hereby, reversed and remanded to the Administrative Law Judge for further proceedings and orders consistent herewith, including an order on claimant's request for preliminary benefits.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ March, 2002.

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BOARD MEMBER

c: Dennis L. Phelps, Attorney for Claimant  
Gerald D. Lasswell, Attorney for Claimant  
Terry J. Torline, Attorney for Respondent and American Interstate Insurance Co.  
E.L. Lee Kinch, Attorney for Respondent  
James Roth, Attorney for Kansas Workers Compensation Fund  
Nelsonna Potts Barnes, Administrative Law Judge  
Philip S. Harness, Workers Compensation Director